No. 02-57096

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EIJINIO BANUELOS,

Plaintiff / Appellant,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Defendant / Appellee.

United States District Court
Central District of California
Docket No. CV-00-05630-RJK

BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLEE'S PETITION FOR PANEL REHEARING AND/OR SUGGESTION FOR REHEARING *EN BANC*

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INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MUTLIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of employee benefits legislation and regulations promulgated to implement the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. §§ 1001-1169, as amended, and other laws affecting multiemployer plans, including the claims review concepts in ERISA and the claims review regulations implicated by the panel's decision. Currently, 311 multiemployer pension plans are affiliated with the NCCMP. These affiliated plans cover a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. The NCCMP has frequently participated as *amicus curiae* in the United States Supreme Court and the federal courts of appeal.

Multiemployer plans provide medical, pension and other coverage for millions of American workers. Multiemployer pension plans alone cover some ten million workers, one-fifth of all American workers with pension plans.[1] By law, these plans are administered by boards of trustees comprised of individuals appointed half by labor and half by management; each trustee owes a duty of loyalty to plan participants and beneficiaries. The well-being and security of employees, retirees and their dependents are directly impacted by multiemployer pension plans, and interference with the maintenance and growth of such plans is deemed to be contrary to the national public interest. 29 U.S.C. §§ 1001(a)(1), (3) and (c)(2).

The NCCMP and its members have a strong interest in urging a panel rehearing or the *en banc* review and reversal of the panel's decision in this matter. If allowed to

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[1] See Harriet Weinstein and William J. Wiatrowski, *Multiemployer Pension Plans, Compensation and Working Conditions*, 23 (Spring 1999).

stand, the decision will significantly and adversely impact the administration and review of claims decisions by ERISA plan trustees. It will require that plans do more than provide a "full and fair review" of adverse benefit determinations; it has the effect of imposing an obligation to conduct exhaustive review of claims appeals in order to create formal administrative records covering any matter which might be the subject of a subsequent appeal to the courts. To create that record, trustees would be required to create documentation of facts and matters of which they are intimately knowledgeable due to their experience in administering their plans. The result will be a significant increase in the costs of claims administration. It will also transform the claims appeal process of plans from one which seeks to reach the correct result through non-adversarial, efficient mechanisms to an adversarial one which can turn on technical questions of procedural compliance, regardless of whether the right outcome is reached.

SUMMARY OF REASONS FOR *EN BANC* REVIEW

The panel's decision imposes a heightened formalistic administrative record requirement on the process of claims review by ERISA fiduciaries and penalizes the plan by ordering it to pay a benefit not provided for in the pension plan itself. This encroaches impermissibly on the regulatory authority of the Secretary of Labor. The Opinion[2] poses a threat to the function of the claims appeal process of benefit plans nationwide. The panel's reasoning undermines two primary goals of ERISA: that employee benefits be paid only to those who are entitled under the terms of the plan and that plans and plan participants benefit from a non-adversarial, speedy, efficient, and cost-effective benefit appeal process.

Concluding that Appellant Eijinio Banuelos ("Banuelos") was entitled to a pension under the terms of the pension plan of the Construction Laborers' Pension

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[2] *Banuelos v. Construction Laborers' Trust Funds for Southern California*, ___ F.3d ___, 33 Employee Benefit Cases 1641 (9th Cir. 2004).

Trust for Southern California (the "Plan"), the panel stated that two versions of the plan existed and that Banuelos was entitled to the one more favorable to him. Opinion, at 12077-78. In doing so, the panel declined to consider evidence presented by the Construction Laborers Pension Trust for Southern California (the "Trust") to the district court during a multi-day trial that made clear that the version of the Plan produced by Banuelos was not "the plan." It was an unauthorized, unexecuted, unknown-to-the-Trustees, working draft document of the Trust's lawyers containing a mistake; it included two five-year vesting provisions, one of which was adopted and in the real pension plan of the Trust and one of which had been proposed but rejected in favor of the other. The basis of Banuelos' pension claim was the latter five-year vesting provision never adopted by the trustees of the Trust ("Trustees").

In limiting the Trustees to evidence contained in the administrative record, the decision prevents them from showing that the plan language presented by Banuelos was never adopted. Rather than deferring to the Trustees' interpretation of the Plan, and indeed their conclusion as to what document actually is "the plan," the decision requires the Trustees to enforce a provision that was never adopted. Thus, the Trustees are now prevented from relying on their years of experience and knowledge of what the plan provides and their recognition that the vesting rule cited by Banuelos' attorney was not the five-year vesting rule of the plan. By awarding Banuelos a pension, the panel sanctions the plan and the Trustees for failing to put formally into the administrative record any and all information that arguably might be needed to substantiate their collective knowledge of the details of the plan and its development.

The panel decision has significant implications. It imposes obligations on plans that are not the obligations of ERISA, going beyond ERISA's requirement that plans provide a full and fair review and a statement of reasons for any denial of benefits. Now, plans will have to bear unnecessary costs to create lengthy administrative records, lest they fail to set forth a fact or matter that may bear on their decision to deny a benefit. This will convert claims review into a protracted, adversarial process with resultant costs that will serve to reduce the resources available to provide employee benefits.

REASONS FOR *EN BANC* REVIEW

I.

THE PANEL'S DECISION USURPS THE AUTHORITY GRANTED THE SECRETARY OF LABOR BY IMPOSING ON THE TRUST AN ADDITIONAL OBLIGATION TO INCLUDE IN THE ADMINISTRATIVE RECORD A FINDING OF FACT TO SUPPORT A DENIAL OF PENSION BENEFITS.

"ERISA was enacted to promote the interest of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113, 109 S.Ct. 948 (1989). As the Supreme Court noted,

> The Act furthers these aims in part by regulating the manner in which plans process benefits claims. Plans "must provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant." 29 U.S.C. § 1133(1). ERISA further requires that plan procedures "afford a reasonable opportunity … for a full and fair review" of dispositions adverse to the claimant. § 1133(2).

Black & Decker Disability Plan v. Nord, 538 U.S. 822, 123 S.Ct. 1965, 1970 (2003).

The Secretary of the Department of Labor ("Secretary"), being charged with the authority to prescribe regulations necessary or appropriate to carrying out ERISA's provisions securing employee benefits, 29 U.S.C. § 1135, has set forth minimum standards for what constitutes notice and a "full and fair review" by a multiemployer pension plan. The Secretary requires that a plan administrator provide written or electronic notification of any adverse benefit determination. For pension plans, notice shall be in a manner calculated to be understood by the claimant and shall set forth:

(i) The specific reason or reasons for the adverse determination;

> (ii) Reference to the specific plan provisions on which the determination is based;
>
> (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; [and]
>
> (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review.

29 C.F.R. § 2560.503-1(g). A "full and fair review" entails four basic parts:

> 1. The claimant must be given at least 60 days to appeal an adverse benefit determination;
>
> 2. The claimant must have an opportunity to submit "written comments, documents, records, and other information;"
>
> 3. The claimant must be given reasonable access to "documents, records, and other information relevant to the claimant's claim for benefits;" and
>
> 4. The review of the claim must take into account "all comments, documents, records, and other information submitted by the claimant relating to the claim."

29 C.F.R. § 2560.503-1(h)(2)(i)-(iv). Together, ERISA and these DOL regulations set forth the procedural requirements plan administrators must meet in making claim determinations.

During the appeal of Banuelos' denial of pension benefits, the Trustees had before them the Plan document as they understood it and a quote in a letter from counsel to Mr. Banuelos reciting the five-year vesting provision on which Banuelos relied. Based on their understanding of the Plan, the Trustees rejected the five-year vesting provision as inconsistent with the Plan. Defendant-Appellee's Petition for Panel Rehearing and/or Suggestion for Rehearing *En Banc* "Petition for Rehearing" at 3-4. Accordingly, Banuelos was notified that his appeal was denied. Thus, the Trustees satisfied the notice and full and fair review requirements established by the Secretary.

The panel's decision adds to the requirements by the Secretary under the authority granted by Congress. Reviewing the Trustees' denial of benefits to

Banuelos under the arbitrary and capricious standard, the panel held that the district court was not permitted to hear additional evidence that the five-year vesting amendment had not been adopted. Left only with conflicting versions of the plan, the panel states that the one most favorable to Banuelos must be applied. Opinion, at 12077-78. However, the Trustees knew they had never adopted five-year vesting and did not need to develop an administrative record to establish that no such provision was in effect. By requiring the Trustees to engage in the exercise of making a record determination of what they know the plan said, the panel imposed a notice and review obligation beyond those established by the Secretary.

Given that only the Secretary is empowered to promulgate rules for the administration of ERISA, the ability of the courts to render decisions which infringe upon the power of the Secretary is narrowly circumscribed; "the scope of permissible judicial innovation is narrower in areas where other federal actors are engaged..." *Nord*, 123 S.Ct at 1970. The DOL regulations do not require plan administrators to create an administrative record which exhaustively supports their reasons for denying benefits. Plan administrators are not even required to set forth or inform a participant of the reasoning on which they base benefit denials:

> "The district judge went astray by requiring that the plan administrator articulate the grounds for the interpretation in the course of reviewing an adverse determination on a claim for benefits, as if the plan administrator were an administrative agency. There is no such requirement in the law. The administrator must give the "specific reasons" for the denial, but that is not the same thing as the reasoning behind the reasons… All the [plan administrator] has to do is give the applicant the reason for the denial of benefits; he does not have to explain to him why it is a *good* reason. To require that would turn plan administrators not just into arbitrators, for arbitrators are not usually required to justify their decisions, but into judges, who are."

Gallo v. Amoco Corp., 102 F.3d 918, 923 (7th Cir. 1996) (citations omitted), *cert. den.*, 521 U.S. 1192 (1997). The regulations only require that the claimant be permitted to present records and information, and that any determination consider them.

Nord is instructive. In reversing the appellate court's decision, the Supreme Court determined that the judicially-imposed "treating physician" rule was not enforceable. The rule required plan administrators to give special weight to the opinions of a claimant's physician over that of non-treating physicians. The Court concluded that the "Court of Appeals therefore erred when it employed a treating physician rule lacking Department of Labor endorsement." *Id*. at 1972. Not only was it lacking endorsement, it was contrary to the Secretary of Labor's view that "ERISA is best served by 'preserv[ing] the greatest flexibility possible for … operating claims processing systems consistent with the prudent administration of a plan." *Id*., citing Department of Labor, Employee Benefits Security Administration, http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html, Question B-4 (as visited May 6, 2003).

Like the appellate court decision in *Nord*, the panel's decision exceeds the power of the court, effectively imposing a requirement that plan administrators create an administrative record that contains all underlying facts to support their claim determinations and their reasoning as to what their pension plan provides. The Secretary has not imposed this obligation, likely recognizing that it would dissolve the interest in preserving the operational flexibility and economy of ERISA plans.

II.

THE PANEL'S DECISION THREATENS TWO PRINCIPAL OBJECTIVES OF ERISA: TO ENSURE THAT BENEFITS ARE PROVIDED ONLY TO EMPLOYEES WHO ARE ENTITLED TO THEM UNDER THE TERMS OF A PLAN AND TO PROVIDE THOSE BENEFITS IN A SYSTEM WHICH IS EFFICIENT, COST-EFFECTIVE AND NON-ADVERSARIAL.

As the Supreme Court has observed, "ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Ann. Ins. Co. v. Knudson*, 534

U.S. 204, 209 (2002) (internal quotations and citations omitted.) Several critical concerns were present throughout this development; two of which are highlighted in the case at bar. First, Congress sought to provide benefits to participants only where such benefits are due under the terms of a plan. Second, the process of claims review was to be non-adversarial, to entail minimal costs, and to be conducted to reduce the number of frivolous lawsuits so as not to burden the plan's resources held in trust for all of the beneficiaries. *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980). The panel's decision in this matter not only fails to serve these goals but actually creates impediments to achieving them.

A. ERISA Seeks To Insure The Payment of Benefits That Are Required Under The Terms Of A Plan, Not To Provide Benefits To Participants Who Do Not Qualify.

ERISA and related legislation exists to safeguard and ensure the payment of employee benefits with the obvious caveat that the benefits to be provided are actually due. See *Nord*, 123 S.Ct. at 1970. The obligation of plan administrators in determining whether to award an employee benefit is to make the correct determination, i.e., to get it right. The fact that some employees are entitled to benefits is coupled with the corresponding corollary that other employees are not. ERISA is not intended to give a pension to an employee who has not, under the terms of the plan, become entitled to one. 29 C.F.R. § 2560.503-1(b)(5) (plans must have claims procedures that "contain administrative processes and safeguards designed to ensure and verify that benefit claim determinations are made in accordance with governing plan documents"). Otherwise, the assets of the plan which are held in trust for other participants, who are or will be entitled to a benefit, would be wasted.

ERISA jurisprudence evidences this emphasis on the provision of benefits only to those employees entitled to them under the terms of a plan. Under the rules governing offsets, a plan may offset against future benefit payments amounts of prior overpayments. Section 203(a)(3)(B) of ERISA allows a plan to permanently suspend the payment of benefits during certain periods of reemployment of the participant occurring after the commencement of benefit payments. If benefit payments are erroneously made during such a time of suspension, the plan may offset against future benefit payments amounts of the erroneous overpayments. 29 C.F.R.§ 2530.203-3(b)(3). Similarly, the Ninth Circuit has held that a plan may offset against benefits owed a surviving spouse any overpayments made to the participant due to the participant's fraud. *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 305-306 (9th Cir. 1995). Thus, rather than permit a payment of benefits that is incorrect, even if relatively insubstantial in amount, these offset rules demand that the error be remedied so that only the correct payment amount called for by the plan be delivered to and retained by the plan participant.

While these offset provisions provide recourse to a plan to correct erroneous overpayments, the Ninth Circuit has also interpreted the statutes of limitations under ERISA to provide participants a comparable latitude to correct nonpayments. In *Meagher v. International Association of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988), *cert. den.*, 490 U.S. 1039 (1989), a retiree brought an action against his pension plan for wrongfully reducing his pension payments. The plan raised the statute of limitations as a defense. *Id*. at 1421. Finding that the plan erroneously denied benefits, the court also determined that the statute of limitations was in effect, with a new three-year statute running from the receipt of each benefit payment check by the retiree. *Id*. at 1423. Thus, rather than using the date of the administrative benefit determination as a cut-off which completely denied the retiree an opportunity to obtain mistakenly-denied benefits, the court interpreted the statute of limitations liberally to permit the retiree to obtain correction of those benefit payments which were within three years of being due. *Id*.

Both *Meagher* and the offset rules emphasize the underlying premise of ERISA that benefits should be provided only to those employees who are entitled to receive them under the terms of the plan and that where the correct determination was not made in the first instance, opportunity will be provided to correct the error and make it right. That premise is undercut by the ruling of the panel.

B. Through ERISA, Congress Instituted An Efficient, Cost-Effective, Nonadversarial System Of Claims Administration Within Trust Funds.

Throughout the development of ERISA, administrative efficiency was a primary goal of Congress. Various alternatives were advanced for meeting the need for flexibility in employee benefit determinations. Early proposals authorized the Secretary of Labor to hear and decide benefit claims disputes arising under plans, while later proposals considered requiring plans to provide arbitration.[3] However, these proposals were dropped out of fears that they would be too costly to plans and would encourage frivolous claim disputes.[4] Ultimately, the current, more informal requirement that plans provide a full and fair review by plan fiduciaries was adopted.[5]

The benefit claims process was designed to be nonadversarial, efficient, cost-effective, and to reduce the number of lawsuits that would result. The process was not intended to be a full adjudication of rights akin to a trial. Instead, it was streamlined to provide the plan with the information necessary to make the correct determination of whether benefits are owed while also informing the participant of the basis for a

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[3] S. 1179, 93d Cong., 1st Sess. § 602 (1973), *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, 1976 ("ERISA Leg. Hist."), at 988; S. 4, 93d Cong., 1st Sess. § 691 (1973), ERISA Leg. Hist. at 1489; H.R.2, 93d Cong., 2d Sess. § 691 (1974), ERISA Leg. Hist. at 3813.

[4] Senate Floor debate on conference report on H.R. 2 (1974), ERISA Leg. Hist. at 4769.

[5] Employee Retirement Income Security Act of 1974 § 503, 29 U.S.C. § 1133 (1974), ERISA Leg. Hist. at 4900.

denial of a benefit claim so that the participant would be sufficiently informed to seek recourse in the courts if he or she so desires.

In support of this scheme, courts adopted the exhaustion requirement under which participants are required to exhaust their administrative remedies before seeking review of a claim denial in federal court. *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980). The exhaustion principle was originally developed under the law governing employee benefit claim actions under Section 301 of the Labor Management Relations Act of 1947 ("LMRA") and then incorporated into ERISA by Congress, which directed that all actions under ERISA to enforce benefit rights be regarded as arising under the laws of the United States in a fashion similar to those brought under Section 301. *Id*.

The clear purpose of the exhaustion requirement was to institutionalize administrative claim procedures within the plans themselves, thereby reducing the number of frivolous lawsuits, promoting consistency of claim determinations, creating a nonadversarial claims settlement process[6], and minimizing the costs of claims administration. *Id*. As this Circuit has noted,

> It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary [of Labor] to require covered plans to provide administrative remedies for aggrieved claimants did not lead courts to see that those remedies are regularly used.

Id. Accordingly, federal courts have the ability to enforce the exhaustion requirement, and, in the Ninth Circuit, are cautioned to do so. *Id*. at 968.

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[6] In fact, from the perspective of multiemployer plans, the benefit determination process is not considered to be adversarial. Plan trustees appointed by labor and by management naturally and routinely seek to find any legitimate means to award benefits to individual participants appearing before them so long as they can do so within the terms of the plan. Of course, this focus is in keeping with the obligations of the trustees as fiduciaries to act for the benefit of the beneficiaries of the plan. See *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 330-33, 101 S.Ct. 2789, 2794-96 (1981).

In the case of multiemployer plans, designating plan administrators (the Trustees) as the main repository of claim review and plan interpretation is in keeping with the fundamental nature of employee benefits. Thus, the panel decision interferes with that informal administrative review process. When confronted with clear indications that the administrative record was incomplete as to facts questioning the legitimacy of the five-year vesting provision offered by Appellant (Opinion, at 12068), the panel should have remanded the matter back to the Trustees for further consideration. *Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455 (9th Cir. 1996) (holding that although trustees of an ERISA plan misconstrued the plan, the district court should not make the benefit determination, but should remand to the plan trustees to apply the plan as properly construed). This is particularly so since the district court was made aware of facts having a bearing on the legitimacy of the plan provision relied on by Banuelos. See, *Kosty v. Lewis*, 319 F.2d 744, 749 (D.C. Cir. 1963) *cert. den.*, 375 U.S. 964 (1964),

Remand serves both the congressional mandate that plan administrators be primarily responsible for reviewing participant claims and the obligation of the participant to exhaust his administrative remedies. The failure to remand creates a precedent which will prompt plan administrators to engage in protracted fact-finding at the level of claim review in order to create an administrative record that will withstand potential future attack against the reasoning behind benefit denials. In essence, the two day trial that was conducted in this case in the district court will have to be carried out on the administrative level. The result: administrative proceedings will likely become more protracted and administrative costs will most likely increase.

Since the creation of the administrative record will be determinative on appeal, the process will become more adversarial. Participants may be tempted to prevent harmful facts from being included in the administrative record. Here, Banuelos' attorney did not present to the Trustees the "plan" document on which he purported to rely, but only cited a five-year vesting provision. It was not until Banuelos attached the contrary plan document to his complaint in the district court that the Trustees became aware of it. Petition for Rehearing, at 1-2. The unwritten result is to reward the withholding of documents from the administrative record.

The matter should be remanded to the Trustees for consideration of Banuelos' five-year vesting claim as Congress intended.

III.

THE PANEL DECISION GRANTING APPELLANT A PENSION IS IN CONFLICT WITH THE CIRCUIT'S APPLICATION OF THE ESTOPPEL DOCTRINE.

The panel limits the administrative record and prevents inclusion of evidence that the purported plan document relied upon by Appellant was not the actual plan adopted by the Trustees and proceeds to award Appellant a pension on the basis that he is entitled to the more favorable version of the plan. Opinion, at 12077-78. This decision operates as an improper application of estoppel doctrine. Ninth Circuit precedent holds that an ERISA plan may not be estopped to deny benefits which are not due under the plan documents, even where the plan has made a mistake.

The Ninth Circuit has never ruled that a pension applicant is entitled to benefits through the application of estoppel principles. In *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1356-57 (9th Cir. 1984), *cert. den.*, 474 U.S. 865, 106 S.Ct. 183 (1985), this Court held that ERISA preempts common law theories of promissory estoppel, estoppel by conduct, and equitable estoppel. Other courts have held that estoppel may not be applied against a plan to award benefits to a participant who would not otherwise be entitled thereto under the written pension plan. Thus, for example, in *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992), *cert. den.*, 507 U.S. 987, 113 S.Ct. 1586 (1993), the court held that notions of promissory estoppel will not be imported into ERISA. The court rejected a participant's contention that he was entitled to increased benefits under the plan because he had received written communications from the plan indicating that his retirement benefits would include the period of time when he was an hourly employee, and not just the period of time he was a salaried employee, which was clearly not authorized by the applicable plan. Quoting *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265-66 (10th Cir. 1988), the court stated:

> "ERISA's express requirement that the written terms of a benefit plan shall govern forecloses the argument that Congress intended for ERISA to incorporate state law notions of promissory estoppel."

978 F.2d at 624.

In *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985), this Court recognized that estoppel principles have been applied to pension plans,[7] without explicitly holding that estoppel could be applied against an ERISA pension plan. Nevertheless, this Court analyzed whether Ellenburg could satisfy the elements of an estoppel claim. The elements of such a claim are: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Id*. at 1096. The court found that Ellenburg could not satisfy several of the elements, including the element of reasonable reliance.

The panel decision conflicts with this Circuit's precedents relating to estoppel in two ways. First, the panel's decision effectively holds that the Pension Trust is estopped to deny the plaintiff's pension application because an employee of the Trust's administrator once gave the attorney for the participant (in another case) a plan

[7] This Court cited *Lavin v. Marsh*, 644 F.2d 1378 (9th Cir. 1981) and *Rosen v. Hotel Restaurant Employees, etc.*, 637 F.2d 592 (3rd Cir. *cert. den.*, 454 U.S. 898 (1981)) as authority. *Lavin* did not involve an ERISA pension plan. It involved the United States Army's pension plan. *Rosen* is not a Ninth Circuit decision.

document which contains an error. Thus, the court has effectively held that estoppel may be applied against an ERISA plan, contrary to this Court's decision in *Blau*.

Second, and more importantly, even if this Court views the *Ellenburg* decision as having held that estoppel principles may be applicable to an ERISA pension plan, the panel decision completely fails to analyze whether Banuelos has satisfied the elements of an estoppel claim. It is clear that he does not. Banuelos never "relied" on the document received by his attorney in 1998. He could not have done so since he last worked in covered employment in 1991. In addition, all of the amendments to the actual plan which are potentially at issue in this case were adopted between 1993 and 1998, **after** Appellant incurred his first one year break in 1990, which suspended his credits. Thus, Banuelos did not act or fail to act to his detriment based on anything contained in the erroneous alleged plan document received by an attorney in 1998 who later became his attorney.

Rather than preventing the Trustees from introducing the factual basis for the plan's determination to deny Banuelos a pension, the panel should either have remanded the matter with instructions that the record be augmented or affirmed the district court's determination that it could hear such evidence without the necessity of remand. Instead, a benefit which the Trustees clearly never adopted has been awarded, and an unfounded monetary obligation imposed on the plan.

IV.

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges that the plan's request for Panel rehearing and/or *en banc* review of the panel's decision be granted .

Dated: September ___, 2004

Respectfully submitted,

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By:___________________________________

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TABLE OF CONTENTS

Page